Supreme Court, U.S.
FILED

No. 05-694 NOV 28 2005

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In The

Supreme Court of the United States

SUWIT PRASOPRAT,

Petitioner,

v.

MICHAEL BENOV, Warden of the Metropolitan Detention Center,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May the extradition court deny extradition of a United States citizen based on the "humanitarian exception" to rule of non-inquiry where the citizen faces certain death in the requesting country for a crime that in the United States that could result in an eight-year sentence under the Advisory United States Sentencing Guidelines?

2. Does federal due process require that a United States citizen who is the subject of an extradition request may seek discovery of the requesting country's procedures and conditions if he invokes the "humanitarian exception" to the rule of non-inquiry?

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PETITION FOR A WRIT OF CERTIORARI

The petitioner Suwit Prasoprat respectfully prays that a writ of certiorari issue to review the decision issued by the United States Court of Appeals for the Ninth Circuit's decision affirming the judgment of the district court affirming Prasoprat's habeas petition.

OPINION BELOW

The Ninth Circuit's opinion is reported as *Suwit Prasoprat v. Michael Benov*, 421 F. 3d 1009 (9th Cir. 2005). Appendix 1. The district court's decision in this case is reported at *Suwit Prasoprat v. Michael Benov*, 294 F. Supp. 2d 1165 (C. D. Cal. 2003.) Appendix 2.

JURISDICTION

On August 31, 2005, the United States Court of Appeals for the Ninth Circuit affirmed the district court's decision (App. "1".) Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 3184 of Title 28 of the United States Code provides:

> Section 3184. Fugitives from foreign country to United States
>
> Whenever there is a treaty or convention for extradition between the United States and any foreign government, or

in cases arising under section 3181(b), any justice or judge of the United States, or any magistrate [United States magistrate judge] authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, or provided for under section 3181(b), issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate [United States magistrate judge], to the end that the evidence of criminality may be heard and considered. Such complaint may be filed before and such warrant may be issued by a judge or magistrate [United States magistrate judge] of the United States District Court for the District of Columbia if the whereabouts within the United States of the person charged are not known or, if there is reason to believe the person will shortly enter the United States. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, or under section 3181(b), he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender.

STATEMENT OF THE CASE[1]

Mr. Suwit Prasoprat is a United States citizen. "In 1998, confidential informant reported to an agent of the Drug Enforcement Administration ("DEA") that Prasoprat was involved in heroin trafficking between Bangkok, Thailand, and Los Angeles. The DEA monitored Prasoprat for several years and, in 2001, the United States filed a complaint in the United States District Court on behalf of the Government of the Kingdom of Thailand, seeking Prasoprat's extradition to Thailand pursuant to the extradition treaty between the United States and Thailand. The complaint alleged that Prasoprat and another individual were wanted in Thailand for drug offenses that are covered by the extradition treaty. Prasoprat was ordered detained by the magistrate judge.

Prasoprat filed a motion for discovery, seeking information allegedly in the government's "exclusive possession" that related to the use of the death penalty in Thailand as punishment for drug offenses. Prasoprat argued that the extradition request violated the extradition treaty because the offense for which extradition was sought was punishable by death in Thailand, but not in the United States. He therefore sought an order "for the government to disclose any information that the death penalty is the punishment for drug convictions in Thailand.

The magistrate judge denied Prasoprat's discovery motion. He reasoned that the extradition treaty explicitly placed the authority to examine the issue of the death

[1] For the purposes of this petition, Prasoprat adopts the background as reported by the Court of Appeals and repeats it here.

penalty in determining extradition within the executive branch, not the judicial branch. The court thus ruled that discovery regarding the availability of the death penalty was not appropriate.

Following an extradition hearing, the magistrate judge determined that the government had established probable cause to sustain the narcotics charges. The court therefore entered an extradition certification, ordering that Prasoprat was extraditable and certifying the matter to the United States Secretary of State to issue a warrant to extradite Prasoprat.

Prasoprat then filed this petition for a writ of habeas corpus. The magistrate judge submitted a report and recommendation to the district court, recommending that the petition be denied. The district court adopted the report and denied Prasoprat's petition. See *Prasoprat v. Benov*, 294 F. Supp. 2d 1165 (C.D. Cal. 2003). Prasoprat filed a timely notice of appeal.

The district court issued a certificate of appealability on two grounds: (1) the extradition court's denial of Prasoprat's discovery request for information regarding the death penalty in Thailand for drug possession; and (2) the extradition court's refusal to deny extradition on humanitarian grounds. (App 1.) The Ninth Circuit affirmed the district court's decision to deny the petition for a writ of habeas corpus. *Prasoprat v. Benov*, 421 F. 3d 1009 (9th Cir. 2005).

On October 25, 2005, the Ninth Circuit issued an Order granting Prasoprat's motion to stay the mandate pending the filing of a petition for a writ of certiorari and extending the stay of extradition. (App. 2.)

REASONS FOR GRANTING THE WRIT

A. EXTRADITION COURTS MAY DENY EXTRADITION OF A UNITED STATES CITIZEN BASED ON THE "HUMANITARIAN EXCEPTION" TO THE RULE OF NON-INQUIRY, ESPECIALLY IN A CASE WHERE THE CITIZEN IS FACING THE DEATH PENALTY AND OTHER TORTUOUS CONDITIONS IN THE REQUESTING COUNTRY FOR A CRIME THAT IN THE UNITED STATES COULD RESULT IN AN EIGHT YEAR SENTENCE

Extradition from the United States is governed by 18 U.S.C. § 3184 which confers jurisdiction on a judge of the United States to conduct an extradition hearing under the relevant extradition treaty between the United States and the requesting nation. *Cornejo-Barreto v. Seifert*, 218 F. 3d 1004, 1009 (9th Cir. 2000).

Extradition is initiated by a request from the foreign state to the Department of State. The Department of State determines whether the request is within the relevant treaty, and if so, forwards the request to the Department of Justice. The request is eventually forwarded to the United States Attorney for the judicial district where the person sought is located. The U.S. Attorney then files a complaint in the district court and seeks an arrest warrant. *Cornejo-Barreto v. Seifert, supra*, 218 F. 3d at 1009.

The person sought is brought before a magistrate for a hearing. The purpose of the hearing before the magistrate is to determine whether (1) the crime is extraditable and (2) there is probable cause to sustain the charge. If these two requirements are met, the judicial officer must certify the individual as extraditable to the Secretary of State. *Id.* The "rule of non-inquiry" usually requires extradition

courts to refrain from undertaking inquiries into the justice systems of foreign countries. *Cornejo-Barreto v. Seifert, supra*, 218 F. 3d at 1009. However, in limited instances, Prasoprat argues that the federal courts may inquire into the justice systems and conditions of requesting countries who are seeking to prosecute United States citizens and that the federal courts have the power to deny extradition based on the "humanitarian exception" to the rule of non-inquiry. *Arnbjornsdottir-Mendler v. United States*, 721 F. 2d 679, 683 (9th Cir. 1983).

In the present case, Prasoprat, who is a United States citizen, was arrested pursuant to an extradition arrest warrant based on an extradition request from the Kingdom of Thailand. (ER 34-35.)[2] The alleged offense involved transportation of heroin into the United States from Thailand for sale. (ER 35.) The penalty for drug offenses in Thailand is death.

During the extradition proceedings, Prasoprat requested that extradition to Thailand be denied based on the "humanitarian exception" to the rule of non-inquiry because Thailand routinely executes drug offenders. Prasoprat is certain that if he were extradited to Thailand and was convicted of transportation of heroin, he would suffer a violent death.

In the district court, Prasoprat requested discovery in the possession of the United States government relating to the death penalty for drug offenses in Thailand to support his request that extradition should be denied based on the humanitarian exception to the rule of non-inquiry. In

[2] "ER" refers to the Excerpts of Record filed in the United States Court of Appeal for the Ninth Circuit.

support of his motion, Prasoprat provided the district court with newspaper articles that supported his belief that he would be shot and killed if he were extradited to Thailand. Three of the articles stated:

- "Execute them immediately ... the Interior Ministry is seeking to have orders for the execution of drug convicts carried out immediately, in the hope of discouraging drugs and drug-related crimes." Excerpt from *Bangkok Post*, dated October 15, 1998.

- "If we want the death penalty to have an obvious effect, it should be done right away ... Under the law, drug convicts face the death penalty ..."

- "The officers who carried out the *extrajudicial* killing of the amphetamine suspects deserved credit for their anti-drug efforts." Excerpt from *Bangkok Post*, dated January 14, 1997. (ER 84-87.)

Thus, Prasoprat's fears of death are well [illegible]unded. Recently, Prasoprat found articles confirming that Thailand is continuing to execute people for drug offenses: Human Rights Watch Publications recently reported that in Thailand that a "war on drugs" would be waged on drug dealers. The article continued, "The use of the term 'war' was apt: over the next three months more than 2,000 people were killed as the government effectively declared 'open season' on those accused of involvement in the drug trade. The crackdown saw rampant human rights violations, including *government promotion of violence* against drug suspects, *extrajudicial executions*, blacklisting of drug suspects without due process, intimidation of human rights defenders, and violence and other breaches of due process by the Royal Thai Police." (Appendix 6.) In addition, The Bangkok Post reported on May 29, 2005, that

over 2,000 deaths during a government crackdown on drugs were not properly investigated. (Appendix 7.)

Based on this type of information, Prasoprat sought an order for the government to disclose any information concerning Thailand's use of the death penalty to support Prasoprat's plea to deny extradition based on humanitarian grounds because of the cruel, unusual, and violent methods the Thai officials employ to punish people convicted of drug crimes.

The magistrate judge hinted that it may consider Thailand's use of the death penalty in drug cases in Prasoprat's extradition case, but said it was "unaware of any authority on which it could make an assertion that it had authority to make the determination as to extraditability on the basis of a possible penalty." (ER 196.) The Ninth Circuit agreed with the district court that "an extradition magistrate lacks discretion to inquire into the conditions that might await a fugitive upon return to the requesting country. The extradition magistrate's authority has been constrained by statute and caselaw to a narrow inquiry, such that the magistrate judge does not have any discretion to exercise. Once the magistrate judge determines that the crime is extraditable and there is probable cause to sustain the charge, "it is the Secretary of State, representing the executive branch, who determines whether to surrender the fugitive." *Prasoprat v. Benov*, 421 F. 3d 1009, 1016 (9th Cir. 2005).

Prasoprat argues that the Ninth Circuit was incorrect in deciding that the extradition magistrate lacked any authority to refuse to issue a certificate of extradition on humanitarian grounds. *Prasoprat v. Benov*, *supra*, 421 F. 3d at 1017. Circuit courts, including the Ninth Circuit,

have held that a humanitarian exception to extradition is something that may be considered in the extradition context. *Cornejo-Barreto v. Seifert*, 218 F. 3d 1004, 1010 (9th Cir. 2000). "Courts in many jurisdictions, including the Ninth Circuit, have discussed the possibility of a humanitarian exception to extradition, tracing the idea to the influential Second Circuit cas , *Gallina v. Fraser*, 278 F. 2d 77, 79 (2nd Cir. 1960) . . . noting in dicta that we can imagine situations where the relator, upon extradition, would be subject to procedures or punishment so antipathetic to a federal court's sense of decency as to require reexamination of the rule that the extradition court may not inquire into those conditions in making its decision." *Id.* at 1010. See also *Arnbjornsdottir-Mendler v. United States, supra*, 721 F. 2d at 683.

In contrast, other circuits have firmly held that the judiciary may not refuse extradition on humanitarian grounds, but it is the function of the Secretary of State to determine whether extradition should be denied on humanitarian grounds. *Ahmad v. Wigen*, 910 F. 2d 1063, 1067 (2nd Cir. 1990). See also *In re Extradition of Manzi*, 888 F. 2d 204, 206 (1st Cir. 1989); *Ntakirutimana v. Reno*, 184 F. 3d 419, 430 (5th Cir. 1999).

Prasoprat agrees that the Secretary of State may deny extradition based on humanitarian grounds. However, Prasoprat argues both the judiciary and the executive branch may use the humanitarian exception to deny extradition. The extradition treaty authorizes the executive branch to deny extradition based on the death penalty [humanitarian exception] and in the executive's power to conduct foreign affairs. *Blaxland v. Commonwealth*, 323 F. 3d 1198, 1207 (9th Cir. 2003). As for the judiciary, case law authorizes the courts to deny extradition based on the

humanitarian exception. The judiciary has the important role to protect the due process rights of U.S. citizens. Prasoprat is a U.S. citizen wanted by Thailand, a country where the penalty for the charged crime is death. There are reports there are no real appeals process in Thailand and that there are executions of accused drug traffickers prior to trial. (ER 84-87.) Before Prasoprat or any U.S. citizen is sent to a foreign country to face the death penalty, the judiciary must protect the American life by ensuring he receives due process.

If Prasoprat was tried and convicted for the same drug offense in the United States, Prasoprat has calculated that pursuant to the advisory United States Sentencing Guidelines, his sentence could be between 151-188 months if he went to trial or 97-121 months if he pled guilty. (ER 442-444.) Therefore, if Prasoprat was convicted in the United States, his sentence would be approximately eight years, instead of the sentence of death by firing squad in Thailand.

In addition to receiving the death penalty, Prasoprat also will face other tortuous conditions in Thailand. The U.S. Department of State Report on Human Rights – 2001, Thailand reported that Thailand has a reputation for corruption and that some members of the security forces committed serious human rights abuse. The State Department reported that some police officers in Thailand used unwarranted lethal force in apprehending criminal suspects. The State Department also found that: "The Government [Thailand] generally respected the human rights of its citizens; however, significant problems remain in several areas. Police officers killed a number of criminal suspects while attempting to apprehend them . . . police occasionally beat suspects, at times to coerce confessions

. . . routine demands for bribes undermine the rule of law. Conditions in prison and immigration detentions are poor due to severe overcrowding. Lengthy pretrial detention and the prolonged detention of some aliens remain problems. (ER 426-429.)

Prasoprat should not be subject to the tortuous conditions described by the U.S. Department of State. More compelling, is that Prasoprat must not be executed for an offense in Thailand when the penalty for the same offense in the United States is approximately eight years in prison. (ER 442-444.) The fact that a U.S. citizen, if convicted in Thailand, will be executed for an offense that carries an eight-year sentence in the United States is inhumane and warrants application of humanitarian exception to the rule of non-inquiry.

This question has been percolating through the federal circuits since 1960 and there is no definitive answer to this question. Prasoprat urges this Court to grant certiorari to settle the question of whether or not the judiciary may, under limited circumstances, deny extradition based on the "humanitarian exception" to the rule of non-inquiry.

B. FEDERAL DUE PROCESS REQUIRES THAT PRASOPRAT IS ENTITLED TO DISCOVERY RELATING TO THE DEATH PENALTY AND TORTUOUS CONDITIONS IN THAILAND AFTER HE INVOKED THE HUMANITARIAN EXCEPTION TO THE RULE OF NON-INQUIRY

The law is clear that the district court has authority to compel discovery in extradition matters. "Although there is no explicit statutory basis for ordering discovery in

extradition proceedings, the extradition court has the inherent power to order such discovery procedures as law and justice require." *Oen Yin-Choy v. Robinson*, 858 F. 2d 1400, 1407 (9th Cir. 1988), citing *Quinn v. Robinson*, 783 F. 2d 776, 817 n. 41 (9th Cir. 1986). "In exercising its discretion to grant or deny discovery, an extradition court should consider that "extradition proceedings are not to be converted into a dress rehearsal for trial" and "whether the resolution of the contested issue would be appreciably advanced by the requested discovery". *Oen-Yin Choy v. Robinson, supra*, 858 F. 2d at 1407, citing *Emami v. U.S. District Court*, 834 F. 2d 1444, 1452 (9th Cir. 1987).

In this case, the district court denied Prasoprat's request for discovery because it believed it lacked authority to order discovery in this extradition case. (ER 450-454.) Specifically, the district court found that it "did not have discretion to consider a discovery request concerning the conditions that an extraditee may encounter when he is returned based on the rule of non-inquiry". (ER 451.) However, Prasoprat argues that the district court had authority to order discovery relating to the death penalty and tortuous conditions in Thailand because this discovery involved an issue falling under a recognized exception to the rule of non-inquiry in extradition cases.

In this case, Prasoprat, specifically invoked the "humanitarian exception" to the rule of non-inquiry into the judicial process and penalties an extraditee will face upon his return. (ER 189-194.) *Emami v. U.S. District Court, supra*, 834 F. 2d at 1453; *Arnbjornsdottir-Mendler v. United States*, 721 F. 2d 679, 683 (9th Cir. 1983). Therefore, because Prasoprat has a recognized right to invoke this special exception, due process requires that he is

afforded a right to seek discovery concerning the "humanitarian exception". "Needless to say, a habeas court can determine whether the magistrate's decision to deny discovery constituted an abuse of discretion that deprived the accused of due process." *Quinn v. Robinson*, *supra*, 783 F. 2d at 817, n. 41.

The Ninth Circuit agreed with the district court judge and concluded that the extradition court did not abuse its discretion in denying the motion seeking discovery on the use of the death penalty in Thailand because the information sought by Prasoprat did not relate within the scope of the magistrate judge's authority to examine. *Prasoprat v. Benov*, *supra*, 421 F. 3d at 1015.

Prasoprat agrees that discovery requests in extradition cases relating to defenses directly relating to the actual crime charged in the requesting country should be denied. The district court cited to *Charlton v. Kelly*, 229 U.S. 447, 457, 33 S. Ct. 945, 57 L. Ed. 1247 (1913) which held that the district court did not exceed its authority of excluding evidence of insanity because it was offered to show insanity at the time of the commission of the crime which would be a defense during the trial determining guilt or innocence. *Id.* at 462. (ER 451.) In this case, petitioner is not seeking discovery relating to his guilt or innocence. He is instead seeking discovery directly relating to an exception or defense to extradition that is recognized under the case law. *Emami v. U.S. District Court*, *supra*, 834 F. 2d at 1452.

In his discovery request, Prasoprat sought to obtain a discovery order to compel the United States government to disclose any and all documentation or any other evidence that shows the current Thai law, drug policies, penalties

for drug offenses. Prasoprat also requested the names and access to United States officials most qualified on the above-mentioned subjects for the purpose of interviews, depositions, or to include on witness list. (ER 47-48.) Prasoprat requested this discovery because of his belief that he would be killed by firing squad should he be extradited to Thailand. (ER 48.)

The requested discovery would provide evidence to support Prasoprat's plea to the district court to deny extradition based on the "humanitarian exception" – the recognized exception to the rule of non-inquiry. He is not requesting the discovery to defend himself against the actual drug charges because the law is clear that extradition proceedings are not to be converted into a dress rehearsal for trial. *Oen-Yin Choy v. Robinson, supra*, 858 F.2d at 1407.

Furthermore, the law provides that discovery requests in extradition cases should be granted when the "resolution of the contested issue would be appreciably advanced by the requested discovery". *Id.* Here, the requested discovery concerning Thailand's use of the death penalty in extradition cases would resolve the contested issue of whether or not extradition should be denied based on the humanitarian exception. Because Prasoprat has a recognized right to invoke the special humanitarian exception, due process requires that he is afforded a right to seek discovery relating to this exception. Prasoprat respectively requests that this Court grant certiorari to settle this important due process question.

CONCLUSION

For the foregoing reasons petitioner respectfully submits that the petition for writ of certiorari should be granted.

Dated: November, 2005

Respectfully submitted,

BARRY O. BERNSTEIN
Attorney for Petitioner

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APPENDIX 1

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUWIT PRASOPRAT,

Petitioner-Appellant,

v.

MICHAEL BENOV, Warden,

Respondent-Appellee.

No. 03-57253

D.C. No.
CV 02-08751 HLH

OPINION

Appealed from the United States District Court
for the Central District of California
Harry L. Hupp, District Judge, Presiding

Argued and Submitted
October 6, 2004 – Pasadena, California

Submission Vacated November 8, 2004

Resubmitted August 15, 2005

Filed August 31, 2005

Before: Harry Pregerson, A. Wallace Tashima,
and Richard A. Paez, Circuit Judges.

Opinion by Judge Tashima

COUNSEL

Barry O. Bernstein, Burbank, California, for the petitioner-appellant.

Daniel Scott Goodman, Assistant United States Attorney, Los Angeles, California, for the respondent-appellee.

OPINION

TASHIMA, Circuit Judge:

Suwit Prasoprat, a United States citizen fighting extradition to Thailand, appeals an order of the district court denying his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2241. Prasoprat contends that his due process rights were violated when the extradition court denied his motion seeking discovery of information related to the use of the death penalty in Thailand for drug offenses. He also contends that the extradition court should have denied his extradition on humanitarian grounds. We have jurisdiction under 28 U.S.C. §§ 1291 and 2253. We affirm the district court.

Extradition from the United States is a diplomatic process that is initiated by a request from the nation seeking extradition directly to the Department of State. *Blaxland v. Commonwealth Dir. of Pub. Prosecutions*, 323 F.3d 1198, 1207 (9th Cir. 2003). "After the request has been evaluated by the State Department to determine whether it is within the scope of the relevant extradition treaty, a United States Attorney . . . files a complaint in federal district court seeking an arrest warrant for the person sought to be extradited." *Id.*

If, after a hearing regarding the evidence of criminality against a person sought to be extradited, a judge or magistrate judge

> deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention . . . , he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person. . . .

18 U.S.C. § 3184. Thus, a magistrate or judge first holds a hearing to determine "whether (1) the crime is extraditable; and (2) there is probable cause to sustain the charge." *Cornejo-Barreto v. Seifert*, 218 F.3d 1004, 1009 (9th Cir. 2000) (footnote omitted) ("*Cornejo-Barreto I*").[1] The magistrate judge "has no discretionary decision to make." *Lopez-Smith v. Hood*, 121 F.3d 1322, 1326 (9th Cir. 1997). Rather, "[i]f the evidence is sufficient to sustain the charge, the inquiring magistrate judge is required to certify the individual as extraditable to the Secretary of State and to issue a warrant." *Blaxland*, 323 F.3d at 1208. The Secretary of State then determines in her discretion whether the individual will be surrendered. *Id.* (citing *United States v. Lui Kin-Hong*, 110 F.3d 103, 110 (1st Cir. 1997); 18 U.S.C. § 3186).

BACKGROUND

In 1998, a confidential informant reported to an agent of the Drug Enforcement Administration ("DEA") that

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[1] The holding in *Cornejo-Barreto I* was disapproved of by *Cornejo-Barreto v. Siefert*, 379 F.3d 1075 (9th Cir. 2004) ("*Cornejo-Barreto II*"). The en banc court, however, later vacated *Cornejo-Barreto II* and denied the government's request to vacate *Cornejo-Barreto I*. *Cornejo-Barreto v. Siefert*, 389 F.3d 1307 (9th Cir. 2004) (en banc).

Prasoprat was involved in heroin trafficking between Bangkok, Thailand, and Los Angeles.[2] The DEA monitored Prasoprat for several years and, in 2001, the United States filed a complaint in the United States District Court on behalf of the Government of the Kingdom of Thailand, seeking Prasoprat's extradition to Thailand pursuant to the extradition treaty between the United States and Thailand. The complaint alleged that Prasoprat and another individual were wanted in Thailand for drug offenses that are covered by the extradition treaty. Prasoprat was ordered detained by a magistrate judge.

Prasoprat filed a motion for discovery, seeking information allegedly in the government's "exclusive possession" that related to the use of the death penalty in Thailand as punishment for drug offenses. Prasoprat argued that the extradition request violated the extradition treaty because the offense for which extradition was sought was punishable by death in Thailand but not in the United States.[3] He therefore sought an order "for the government to disclose any information that the death penalty is the punishment for drug convictions in Thailand."

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[2] The details of the DEA's investigation are not pertinent to this appeal because Prasoprat does not challenge the finding that there was probable cause that he committed the offense.

[3] Prasoprat also argued that Thailand's extradition request violated Article 3 of the treaty, which provides that extradition shall not be granted when the offense is a political offense, or when it is established that extradition is requested for political purposes. Extradition Treaty with Thailand, Dec. 14, 1983, U.S.-Thail., art. 3, 1983 U.S.T. Lexis 418, *available at* http://www.usextradition.com/thailand_bi.htm. Prasoprat contended that his extradition was sought for political purposes. He does not raise this issue on appeal.

The magistrate judge denied Prasoprat's discovery motion. He reasoned that the extradition treaty explicitly placed the authority to examine the issue of the death penalty in determining extradition within the executive branch, not the judicial branch. The court thus ruled that discovery regarding the availability of the death penalty was not appropriate.

Following an extradition hearing, the magistrate judge determined that the government had established probable cause to sustain the narcotics charges. The court therefore entered an extradition certification, ordering that Prasoprat was extraditable and certifying the matter to the United States Secretary of State to issue a warrant to extradite Prasoprat.

Prasoprat then filed this petition for a writ of habeas corpus. The magistrate judge submitted a report and recommendation to the district court, recommending that the petition be denied. The district court adopted the report and denied Prasoprat's petition. *See Prasoprat v. Benov*, 294 F. Supp. 2d 1165 (C.D. Cal. 2003). Prasoprat filed a timely notice of appeal. The district court issued a certificate of appealability on two grounds: (1) the extradition court's denial of Prasoprat's discovery request for information regarding the death penalty in Thailand for drug possession; and (2) the extradition court's refusal to deny extradition on humanitarian grounds.

STANDARD OF REVIEW

The decision to certify a person as extraditable is not subject to direct appeal but may be challenged collaterally through habeas corpus review. *Barapind v. Enomoto*, 400 F.3d 744, 748 n.5 (9th Cir. 2005) (en banc) (per curiam);

Cornejo-Barreto I, 218 F.3d at 1009. The district court's habeas review of an extradition order is limited to: (1) whether the extradition court had jurisdiction to conduct the proceeding and jurisdiction over the individual sought; (2) whether the extradition treaty was in force and the crime fell within the treaty's terms; (3) whether there was probable cause that the individual committed the crime; and (4) whether the crime fell within the political offense exception. *Id.* at 1009-10; *Mainero v. Gregg*, 164 F.3d 1199, 1205 (9th Cir. 1999); *see also Fernandez v. Phillips*, 268 U.S. 311, 312 (1925) (stating that "habeas corpus is available only to inquire whether the magistrate had jurisdiction, whether the offense charged is within the treaty and . . . whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty").

We review de novo the district court's denial of a habeas petition in extradition proceedings. *Cornejo-Barreto I*, 218 F.3d at 1009; *see also Barapind*, 400 F.3d at 748 (reviewing de novo the district court's decision on questions of law and mixed questions of law and fact). The district court's denial of a discovery request in an extradition case is reviewed for an abuse of discretion. *Emami v. United States Dist. Court*, 834 F.2d 1444, 1452 (9th Cir. 1987).

DISCUSSION

On appeal, Prasoprat raises two issues. First, he contends that the extradition court abused its discretion in denying his motion for discovery regarding the use of the death penalty in Thailand for drug offenses. Second, he

argues that the extradition court should have denied extradition on humanitarian grounds.

I. Discovery Motion

"An extradition proceeding is not a trial[.]" *Emami*, 834 F.2d at 1452. Thus, "discovery in an international extradition hearing is limited and lies within the discretion of the magistrate." *United States v. Kraiselburd (In re Extradition of Kraiselburd)*, 786 F.2d 1395, 1399 (9th Cir. 1986); *see also, e.g., Koskotas v. Roche*, 931 F.2d 169, 175 (1st Cir. 1991) (stating that, "in an extradition proceeding, discovery is not only discretionary with the court, it is narrow in scope"); *cf. Oen Yin-Choy v. Robinson*, 858 F.2d 1400, 1407 (9th Cir. 1988) ("Although there is no explicit statutory basis for ordering discovery in extradition proceedings, the extradition court has the inherent power to order such discovery procedures as law and justice require.").

The issue regarding which Prasoprat sought discovery – the use of the death penalty in Thailand – was outside the purview of the magistrate judge. Article 6 of the extradition treaty between the United States and Thailand deals with capital punishment and states:

> When the offense for which extradition is sought is punishable by death under the laws of the Requesting State and is not punishable by death under the laws of the Requested State, the competent authority of the Requested State may refuse extradition unless:
>
> > (a) the offense is murder as defined under the laws of the Requested State; or

> (b) the competent authority of the Requesting State provides assurances that it will recommend to the pardoning authority of the Requesting State that the death penalty be commuted if it is imposed.
>
> In the case of the United States of America, the competent authority is the Executive Authority.

Extradition Treaty with Thailand, Dec. 14, 1983, U.S.-Thail., art. 6, 1983 U.S.T. Lexis 418, *available at* http://www.usextradition.com/thailand_bi.htm. The treaty thus clearly provides that the executive branch holds the authority for determining extradition when the death penalty is involved.

The only purpose of the extradition hearing is for the magistrate judge to determine whether the crime is extraditable and whether there is probable cause to support the charge. *Cornejo-Barreto I,* 218 F.3d at 1009. If those requirements are met, the judicial officer *must* certify the individual as extraditable to the Secretary of State. *Id.; see also Blaxland,* 323 F.3d at 1208 (stating that "American judicial officers conduct a circumscribed inquiry in extradition cases" and that, "[i]f the evidence is sufficient to sustain the charge, the inquiring magistrate judge is required to certify the individual as extraditable to the Secretary of State and to issue a warrant").

Thus, discovery of information regarding the use of the death penalty in Thailand, like the issue itself, is not relevant to the magistrate judge's inquiry. Even if such evidence were in the government's exclusive possession, it would not be relevant to the magistrate judge's decision regarding whether to certify Prasoprat as extraditable. *Cf. Emami,* 834 F.2d at 1452 (in deciding discovery issues in

extradition hearings, one consideration is "'whether the resolution of the contested issue would be appreciably advanced by the requested discovery'") (quoting *Quinn v. Robinson*, 783 F.2d 776, 817 n.41 (9th Cir. 1986)).

Our conclusion is supported by our decisions in *Kraiselburd* and *Lopez-Smith*. In *Kraiselburd*, the petitioner made a "blanket discovery request" for Argentina, the requesting country, to produce its entire file on the crime with which he was charged. *Kraiselburd*, 786 F.2d at 1399. The magistrate granted the motion only "to the extent it related to the question whether there existed probable cause tying appellant to the murders." *Id.* On appeal from the district court's denial of the habeas petition, we concluded that, "[b]ecause the purpose of the extradition hearing is simply to determine whether there exists probable cause that the fugitive committed the offense charged, the magistrate properly limited discovery." *Id.* Under *Kraiselburd*, therefore, the magistrate judge may limit discovery to issues related to the purpose of the extradition hearing.

Similarly, in *Lopez-Smith*, the petitioner sought to present evidence regarding whether discretion should be exercised to extradite him. On appeal, we stated that the magistrate judge properly excluded evidence addressing the exercise of discretion "because the magistrate judge has no discretion." *Lopez-Smith*, 121 F.3d at 1326. Because discretion belonged to the Secretary of State, *Lopez-Smith* stated that it was "for the Secretary to decide what evidence might have a bearing upon its exercise. There is no reason why the magistrate judge should decide what evidence might be useful to the Secretary of State." *Id.* As in both *Kraiselburd* and *Lopez-Smith*, the evidence that

Prasoprat sought in his motion for discovery was not relevant to the extradition judge's limited inquiry.

Prasoprat urges us to rely on *Demjanjuk v. Petrovsky*, 10 F.3d 338 (6th Cir. 1994), in which government attorneys failed to disclose "exculpatory information in their possession during [denaturalization proceedings] culminating in extradition proceedings." *Id.* at 339. The evidence sought by Demjanjuk, however, related to whether he was in fact the individual who had committed the extraditable offense and thus concerned the probable cause determination. *See In re Extradition of Drayer*, 190 F.3d 410, 415 (6th Cir. 1999) (stating that *Demjanjuk* would require the United States to "turn over any exculpatory materials in its possession that would undercut a finding that there was probable cause to believe that" the petitioner committed the crime charged by the requesting country).

By contrast, in the case at bench, the information sought by Prasoprat does not relate to an issue within the scope of the magistrate judge's authority to examine. When the offense for which extradition is sought is punishable by death, the question of whether to refuse extradition on that basis is within the authority of the executive branch, not the judicial branch.[4] We accordingly conclude that the extradition court did not abuse its discretion in denying the motion seeking discovery on the use of the death penalty in Thailand.

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[4] Prasoprat's assertion that the Executive branch has "exclusive possession" of information concerning the use of the death penalty in Thailand for drug offenses, if true, would bolster the Executive's claim that it has the expertise to exercise the authority granted to the Requested State by Article 6 of the treaty.

II. Humanitarian Exception

Prasoprat's second contention is that the extradition court should have denied extradition on humanitarian grounds. We have long adhered to the rule of non-inquiry – that it is the role of the Secretary of State, not the courts, to determine whether extradition should be denied on humanitarian grounds or on account of the treatment that the fugitive is likely to receive upon his return to the requesting state. *See Blaxland,* 323 F.3d at 1208 (stating that, "judges generally 'refrain from examining the penal systems of requesting nations, leaving to the Secretary of State determinations of whether the defendant is likely to be treated humanely'") (quoting *Lopez-Smith,* 121 F.3d at 1327); *see also Barapind v. Reno,* 225 F.3d 1100, 1105-06 (9th Cir. 2000) (stating that "[m]any courts, including ours, have adhered to the general rule that it is not the role of the courts, but rather the Secretary of State, to determine whether extradition should be denied on humanitarian grounds"). The rule of non-inquiry is based on the principle that the Secretary of State's exercise of discretion regarding whether to extradite an individual may be based not only on "considerations individual to the person facing extradition" but "may be based on foreign policy considerations instead." *Lopez-Smith,* 121 F.3d at 1326. "The need for flexibility in the exercise of Executive discretion is heightened in international extradition proceedings which necessarily implicate the foreign policy interests of the United States." *Emami,* 834 F.2d at 1454 (quoting *Escobedo v. United States,* 623 F.2d 1098, 1105 (5th Cir. 1980)).

We have, on occasion, cited the possibility of a humanitarian exception to extradition; however, we have never actually "relied on it to create" such an exception.

Mainero, 164 F.3d at 1210 ("Assuming that the possibility [of a humanitarian exception to extradition] exists in the abstract, this is not the sort of situation . . . for which an exception might be justified."); *see, e.g., Cornejo-Barreto I*, 218 F.3d at 1010 (stating that "[o]ur research failed to identify any case in which this theoretical exception has been applied" and declining to consider it); *Lopez-Smith*, 121 F.3d at 1326-27 (discussing the "frequently quoted (but not followed) dictum" that a court may apply a humanitarian exception to extradition, but concluding that "the facts in this case are not so egregious as to invoke the dictum").

We therefore agree with the district court that "[a]n extradition magistrate lacks discretion to inquire into the conditions that might await a fugitive upon return to the requesting country." *Prasoprat*, 294 F. Supp. 2d at 1171. The extradition magistrate's authority has been constrained by statute and caselaw to a narrow inquiry, such that the magistrate judge does not have any discretion to exercise. Once the magistrate judge determines that the crime is extraditable and there is probable cause to sustain the charge, "it is the Secretary of State, representing the executive branch, who determines whether to surrender the fugitive."[6] *Blaxland*, 323 F.3d at 1208.

The extradition treaty at issue here repeatedly places the decision to extradite a person from the United States

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[6] We note, however, that in light of legislation implementing the United Nations Convention against Torture, the rule of non-inquiry does not prevent an extraditee who fears torture upon surrender to the requesting government from petitioning for habeas corpus review of the Secretary of State's decision to extradite him. *Cornejo-Barreto I*, 218 F.3d at 1009 n.5, 1016-17.

within the authority of the executive branch. *See, e.g.*, Extradition Treaty art. 8 (stating that, "[i]n a case in which the United States of America is the Requested State, the Executive Authority shall have the power to extradite its nationals if, in its discretion, it is deemed proper to do so"); *id.* art. 13 (when requests for extradition are made by several states, "the decision . . . shall be made by the Executive Authority in the United States of America"). This is in accordance with the "generally established principle . . . that '[t]he Secretary of State, exercising executive discretion through delegation of this authority by the President, may refuse to extradite a relator despite a judicial determination that extradition would be compatible with the terms of the applicable treaty.'" *Blaxland*, 323 F.3d at 1208 (quoting *Lopez-Smith*, 121 F.3d at 1326) (alteration in original). The extradition magistrate simply does not have the authority to consider foreign policy concerns and other issues that may affect the executive branch's decision whether to extradite. *See id.* (stating that "the executive branch's ultimate decision on extradition may be based on a variety of grounds, ranging from individual circumstances, to foreign policy concerns, to political exigencies"). For these reasons, we agree with the district court that the magistrate judge did not have the authority to refuse to issue a certificate of extradition on humanitarian grounds.[6]

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[6] Prasoprat emphasizes that he is a United States citizen. We have stated, however, that "United States citizenship does not bar extradition by the United States." *Quinn*, 783 F.2d at 782.

The judgment of the district court denying Prasoprat's habeas petition accordingly is

AFFIRMED.

APPENDIX 2

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SUWIT PRASOPRAT, Petitioner-Appellant, v. MICHAEL BENOV, Warden, Respondent-Appellee.	No. 03-57253 DC No. CV 02-8751 HLH CD Cal. **ORDER** (Filed Oct. 25, 2005)

Before: PREGERSON, TASHIMA, and PAEZ, Circuit Judges.

After *de novo* reconsideration following full briefing, the order of September 16, 2005, granting petitioner's motion to stay the mandate pending the filing of a petition for a writ of certiorari and extending the stay of extradition filed on February 20, 2004, is hereby confirmed and continued in effect.

APPENDIX 3

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION

SUWIT PRASOPRAT, Petitioner, vs. MICHAEL BENOV, Warden,[1] Respondent.	Case No. CV 02-8751-HLH (JWJ) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE (Filed Nov. 6, 2003)

This Report and Recommendation is submitted to the Hon. Harry L. Hupp, United States District Judge, by United States Magistrate Judge Jeffrey W. Johnson, pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California. For the reasons discussed below, it is recommended that the instant Petition be dismissed with prejudice.

I. BACKGROUND

In 1998, Drug Enforcement Administration ("DEA") Special Agent PiamBoon Tepsuporn was investigating heroin trafficking between the Kingdom of Thailand and the United States. ("Petition for a Writ of Habeas Corpus by a Person in Federal Custody Pursuant to Title 28

[1] The Court has substituted Michael Benov, the current warden of the Los Angeles Metropolitan Detention Center, as respondent to this Petition in place of W.H. Siefert, the former warden.

United States Code Section 2241," p. 7.)[2] At that time, a confidential informant ("CI") informed him of petitioner's suspected involvement in the trafficking. (*Id.* at 8.) The DEA conducted surveillance of petitioner for the next three years. (*Id.* at 8-11.)

On May 17, 2001, an Assistant United States Attorney, acting for and on behalf of the Government of the Kingdom of Thailand, filed a complaint for an extradition arrest warrant against petitioner and another individual. (Opposition, p. 1.) That same day, United States Magistrate Judge George T. Swartz issued an arrest warrant. (*Id.*) On June 5, 2001, United States Magistrate Judge Brian Q. Robbins held a detention hearing and ordered petitioner detained. (*Id.*) On June 15, 2001, the United States filed a request for extradition.

On December 11, 2001, petitioner filed a motion for discovery. The motion sought "any and all documentation or any other evidence that shows the current Thai law, drug policies, penalties for drug offenses, and political agenda relating to drugs." (*Id.* at 2.) Petitioner also sought "names and access to United States officials most qualified on above-mentioned subjects for the purpose of interviews, depositions, or to include on witness lists." (*Id.*) On February 5, 2002, United States Magistrate Judge Jeffrey W. Johnson held a hearing and denied the motion. (*Id.* at 3.)

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[2] Along with the form "Petition for Writ of Habeas Corpus by a Person in Federal Custody (28 U.S.C. § 2241)" (hereinafter "Form Petition"), petitioner filed a memorandum of points and authorities entitled "Petition for a Writ of Habeas Corpus by a Person in Federal Custody Pursuant to Title 28 United States Code Section 2241" (hereinafter "Petition").

On April 24, 2002, Magistrate Judge Johnson held an extradition hearing. (*Id.*) After hearing testimony and viewing a videotape made during the surveillance of petitioner, the magistrate judge found that there was probable cause to believe that petitioner was the individual charged in Thailand and that there was probable cause that the fugitive was engaged in the charged offense, conspiracy to distribute heroin. (*Id.*) On April 30, 2002, Magistrate Judge Johnson issued an extradition certification finding petitioner extraditable and certifying the matter to the United States Secretary of State. (*Id.* at 4.) In that certification, the magistrate judge concluded that he had subject matter jurisdiction, that he had personal jurisdiction over petitioner, that an extradition treaty between the United States and the Kingdom of Thailand was at all relevant times in full force and effect, that the offense with which the fugitive is charged in Thailand was an extraditable offense under the treaty, and that there was probable cause to believe that the fugitive is the person named in the Thai arrest warrant and committed the charged offense. (*Id.*; 4/30/02 Extradition Certification, p. 3.)

On October 31, 2002, petitioner filed in the Ninth Circuit a request to stay his extradition pending the outcome of a petition for writ of habeas corpus. The motion was transferred to this Court, and Magistrate Judge Johnson granted the motion. On December 23, 2002, petitioner filed the instant Petition for Writ of Habeas Corpus by a Person in Federal Custody (28 U.S.C. § 2241).

II. DISCUSSION

A. Legal Standard

Extradition from the United States is governed by 18 U.S.C. § 3184, which confers jurisdiction on any justice or judge of the United States or any authorized magistrate to conduct an extradition hearing under the relevant extradition treaty between the United States and the requesting nation. The extradition magistrate's authority is limited to determining whether (1) the crime is extraditable, and (2) probable cause exists to sustain the charge. *Cornejo-Barreto v. Seifert*, 218 F.3d 1004, 1009 (9th Cir. 2000). If these two requirements are met, the extradition magistrate must certify the individual as extraditable to the Secretary of State. *See* 18 U.S.C. § 3184. The magistrate judge has no discretion; extradition is a matter of foreign policy entirely within the discretion of the executive branch, except to the extent the statute interposes a judicial function. *Lopez-Smith v. Hood*, 121 F.3d 1322, 1326 (9th Cir. 1997).

The well-settled "rule of non-inquiry" requires extradition courts to refrain from inquiring into "procedures or treatment which await a surrendered fugitive in the requesting country." *See, e.g., Mainero v. Gregg*, 164 F.3d 1199, 1205 n. 6 (9th Cir. 1999); *Arnbjornsdottir-Mendler v. United States*, 721 F.2d 679, 683 (9th Cir. 1983).

"The scope of habeas review of an extradition order is severely limited." *Mainero*, 164 F.3d at 1205. In the area of extradition, habeas corpus is not available except to determine three specific questions: (1) whether the extradition court had jurisdiction; (2) whether the offense charged was within the extradition treaty; and (3) whether there was any evidence warranting a finding that there were reasonable grounds to believe the accused guilty.

Fernandez v. Phillips, 268 U.S. 311, 312, 45 S. Ct. 541, 69 L. Ed. 970 (1925); *accord Mainero*, 164 F.3d at 1205; *Bozilov v. Seifert*, 983 F.2d 140, 142 (9th Cir. 1992). Implicit within these questions are whether the extradition court had jurisdiction over the fugitive, and whether the extradition treaty was in full force and effect. *See Hooker v. Klein*, 573 f.2d 1360, 1368 (9th Cir. 1978). If these elements are present, the decision of the extradition magistrate "may not be reviewed on habeas corpus." *Charlton v. Kelly*, 229 U.S. 447, 456, 33 S. Ct. 945, 57 L. Ed. 1274 (1913).

The reason for strictly limiting the jurisdiction of extradition and habeas courts to consideration of the specific questions discussed above has been expressed as follows:

> The need for flexibility in the exercise of Executive discretion is heightened in international extradition proceedings which necessarily implicate the foreign policy interests of the United States. Thus, while Congress has provided that extraditability shall be determined in the first instance by a judge or magistrate, 18 U.S.C. § 3184, the ultimate decision to extradite is ordinarily a matter within the exclusive purview of the Executive.

Emami v. U.S. District Court, 834 F.2d 1444, 1454 (9th Cir. 1987) (internal quotation marks omitted) (quoting *Escobedo v. United States*, 623 F.2d 1098, (5th Cir.), *cert. denied*, 449 U.S. 1036, 101 S. Ct. 612, 66 L. Ed. 2d 497 (1980)).

United States citizenship does not bar extradition by the United States. *Charlton*, 229 U.S. at 467-68; *Quinn v. Robinson*, 783 F.2d 776, 782 (9th Cir. 1986).

B. Discovery Motion

Petitioner claims that the extradition magistrate violated his due process rights by denying his discovery motion seeking disclosure of information relating to the use of the death penalty as punishment for drug crimes in Thailand. (Form Petition, p. 3.)

However, a fugitive in an extradition case has no right to discovery. *See Jhirad v. Ferrandina*, 536 F.2d 478, 484 (2d Cir. 1976); *Matter of Extradition of Mainero*, 990 F. Supp. 1208, 1220 n. 26 (S.D. Cal. 1997); *see also id.* at 1222 n.33 ("There is no authority that exists that requires a magistrate judge to authorize compelled disclosures of explanatory information."). In addition, an extradition magistrate does not have discretion to consider a discovery request for, or make an inquiry into, the conditions that might be encountered by a fugitive upon return to the requesting country. *See Matter of the Extradition of Sandhu*, 886 F. Supp. 318, 321-23 (S.D.N.Y. 1993) (denying request to present evidence of treatment that fugitive will receive upon return to India, based on "rule of non-inquiry"); *Sindona v. Grant*, 619 F.2d 167, 174-75 (2d Cir. 1980) (degree of risk to fugitive's life from extradition is "an issue that properly falls within the exclusive purview of the executive branch"). Petitioner's citations to *Yin-Choy v. Robinson*, 858 F.2d 1400, 1407 (9th Cir. 1988), (Petition, pp. 13-14), are not contrary to this principle.[3]

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[3] In *Yin-Choy*, 858 F.2d at 1407, the court stated that "the extradition court has the inherent power to order such discovery procedures as law and justice require" and that "[i]n exercising its discretion to grant or deny discovery, an extradition court should consider that extradition proceedings are not to be converted into a dress rehearsal for trial and

(Continued on following page)

Further, a discovery ruling in an extradition proceeding is not reviewable by a habeas court; habeas review is limited to the three specific questions discussed above. *Charlton v. Kelly*, 229 U.S. 447, 457, 33 S. Ct. 945, 57 L. Ed. 1274 (1913) ("[M]ere errors in the rejection of evidence are not subject to review by writ of habeas corpus."); *see also McNamara v. Henkel*, 226 U.S. 520, 525, 33 S. Ct. 146, 57 L. Ed. 330 (1913) (same). "Review by habeas corpus . . . tests only the legality of the extradition proceedings; the question of the wisdom of extradition remains for the executive branch to decide." *Sindona*, 619 F.2d at 174.

As the government points out, statements in a few Ninth Circuit cases contemplating habeas review of discovery rulings in extradition proceedings are dicta, setting forth assumptions on uncontested issues. (Opposition, p. 9; *see Quinn v. Robinson*, 783 F.2d 776, 817 n.41 (9th Cir. 1986),[4] *Emami v. U.S. District Court*, 834 F.2d

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whether the resolution of the contested issue would be appreciably advanced by the requested discovery." (Internal quotation marks omitted.)

[4] Footnote 41 in *Quinn v. Robinson*, 783 F.2d at 817 states:

> Although there is no explicit statutory basis for ordering discovery in extradition hearings, *see Merino v. United States Marshal*, 326 F.2d 5, 12-13 (9th Cir. 1963), the extradition magistrate has the right, under the court's "inherent power," *see First National City Bank of New York v. Aristeguieta*, 287 F.2d 219, 226 (2d Cir. 1960), *vacated as moot*, 375 U.S. 49, 84 S. Ct. 144, 11 L. Ed. 2d 106 (1963), to order such discovery procedures "as law and justice require," *Jhirad v. Ferrandina*, 536 F.2d at 484. In exercising discretion, the magistrate should consider both "the well-established rule that extradition proceedings are not to be converted into a dress rehearsal trial," *id.*, and whether the resolution of the contested issue would be appreciably advanced by the

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1444, 1452 (9th Cir. 1987), and *Yin-Choy*, 858 F.2d at 1407). Applying these cases to the present case leads to the conclusion that discovery regarding use of the death penalty would not have advanced the court's resolution of the contested issues properly before it. In contrast to the case at bar, the discovery sought in each of the cited cases was on an issue over which the habeas court had jurisdiction. A habeas court's review of an extradition magistrate's discovery ruling on an issue within the habeas court's jurisdiction is a different matter than permitting a habeas court to review an extradition magistrate's discovery ruling that is completely unrelated to any of the issues reviewable on habeas. Accordingly, this habeas Court lacks jurisdiction to review the denial of petitioner's discovery request.

Moreover, even if an extradition court's ruling on a discovery motion were reviewable, there was no error here. Petitioner did not seek discovery on any of the questions within the extradition judge's authority. Rather, petitioner sought discovery on Thailand's use of the death penalty to punish persons convicted of drug offenses. Unarguably, the authority to deny extradition based on the requesting country's use of the death penalty resides with the Executive Authority. *See* United States-Thailand Extradition

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requested discovery, *id.* Although the accused is not entitled to introduce evidence that goes to his defense, "he may offer limited evidence to explain elements in the case against him". *Jimenez v. Aristeguieta*, 311 F.2d 547, 556 (5th Cir. 1962). Needless to say, a habeas court can determine whether the magistrate's decision to deny discovery constituted an abuse of discretion that deprived the accused of due process. *See id.*; *Jhirad*, 536 F.2d at 484.

Treaty, Article 6.[8] Since petitioner's discovery request was unrelated to any of the inquiries within the extradition magistrate's jurisdiction, and therefore would not have appreciably advanced resolution of the issues in question, (*see Quinn*, 783 F.2d at 817 n. 41; *Jhirad*, 536 F.2d at 484) denial of the discovery motion was proper.

As the extradition magistrate stated, "[t]he treaty by its language does not place the question of the availability of the death penalty within the purview of the judiciary for determination of extraditability." (2/5/02 RT at 5.) It therefore followed that discovery was not appropriate in the proceeding before him. Accordingly, the extradition magistrate did not abuse his discretion, if any, in denying petitioner's Discovery Motion.[9] (*See* 2/5/02 RT at 4-7.) *See Lopez-Smith v. Hood*, 121 F.3d 1233, 1326 (9th Cir. 1997) ("The magistrate judge properly excluded evidence addressing the exercise of

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[8] Article 6 of the United States-Thailand Extradition Treaty provides:

> When the offense for which extradition is sought is punishable by death under the laws of the requesting state and is not punishable by death under the laws of the Requested State, the *competent authority* of the Requested State may refuse extradition unless: (a) the offense is murder as defined under the laws of the Requested State; or (b) the competent authority of the Requesting State provides assurances that it will recommend to the pardoning authority of the Requesting State that the death penalty be commuted if it is imposed. *In the case of the United States of America, the competent authority is the Executive Authority.*

(Discovery Motion, Exh. A (emphasis added).)

[9] Petitioner's discovery motion also sought the requested information to establish that his extradition was sought for political purposes. (Discovery Motion, pp. 5-7.) He has not raised this issue in his Petition for Writ of Habeas Corpus. Therefore, the issue is deemed abandoned.

discretion whether to extradite because the magistrate judge has no discretion.").

C. Humanitarian Exception

Petitioner contends that the so-called "humanitarian exception" to the "rule of non-inquiry" should be applied to his case to prevent his extradition to Thailand because, if extradited, he will suffer the death penalty as punishment for his drug crimes. (Form Petition p. 3; Petition, pp. 12-13.)

The "humanitarian exception" would authorize an inquiry into the procedures or treatment an extraditee would encounter upon surrender where those procedures or punishment are "antipathetic to a federal court's sense of decency." *Gallina v. Fraser*, 278 F.2d 77, 79 (2d Cir.), *cert. denied*, 364 U.S. 851, 81 S. Ct. 97, 5 L. Ed. 2d 74 (1960).

This issue is not cognizable on habeas corpus. An extradition magistrate lacks discretion to inquire into the conditions that might await a fugitive upon return to the requesting country. *See Ahmad v. Wigen*, 910 F.2d 1063, 1066 (2d Cir. 1990) ("A consideration of the procedures that will or may occur in the requesting country is not within the purview of a habeas corpus judge."); *see also Emami v. U.S. District Court*, 834 F.2d 1444, 1452-53 (9th Cir. 1987) ("An extraditing court will generally not inquire into the procedures or treatment which await a surrendered fugitive in the requesting country.").

Although the dictum in *Gallina* – that a habeas corpus court may consider the procedures awaiting a fugitive upon extradition to the requesting country – has

been widely quoted, including by the Ninth Circuit, it appears that no court has actually applied that decision as a basis for denying extradition.[7] *See, e.g., Mainero v. Gregg*, 164 F.3d 1199, 1210 (9th Cir. 1999) (noting that "to date no court has ever denied extradition based on a fugitive's anticipated treatment in the requesting country"); *Lopez-Smith v. Hood*, 121 F.3d 1322, 1326-27 (9th Cir. 1997) (discussing in dicta the possibility of the humanitarian exception); *Emami*, 834 F.2d at 1452-53 (noting that a humanitarian exception to extradition might someday be articulated by the Ninth Circuit); *Arnbjornsdottir-Mendler v. United States*, 721 F.2d 679, 683 (9th Cir. 1983) (same).

Even the Second Circuit, which decided *Gallina*, appears to have distanced itself from that opinion in more recent years. In fact, the Second Circuit has cited *Gallina* for the proposition that the State Department, and not the judiciary, properly inquires into procedures that await the fugitive in the requesting country. *See Ahmad*, 910 F.2d at 1066-67; *Sindona v. Grant*, 619 F.2d 167, 174-75 (2d Cir. 1980); *see also Ntakirutimana v. Reno*, 184 F.3d 419, 430 (5th

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[7] In *United States v. Linson*, 88 F. Supp. 2d 1123 (D. Guam 2000), the district court suggested that it relied on the deplorable conditions in Philippine jails in deciding to deny extradition. *See id.* at 1128 ("The Court in this case also cannot totally ignore the Defense's assertion that the conditions in Philippine jails can be oppressive."). Before this statement, however, the court had held that recantations which completely obliterated probable cause were admissible in the extradition proceeding, thereby precluding a finding of probable cause to extradite. *Id.* Thus, at most, the *Linson* discussion of the humanitarian exception is dictum. Moreover, it is unpersuasive dictum. The district court cited no authority for its statement, and failed to discuss the non-inquiry rule or any of the contrary holdings in the United States Supreme Court and Ninth Circuit, or even the *Gallina* case.

Cir. 1999); *Martin v. Warden, Atlanta Pen.*, 993 F.2d 824, 830 n. 10 (11th Cir. 1993); *Matter of Extradition of Cheung*, 968 F. Supp. 791, 799 (D. Conn. 1997); *Matter of Extradition of Sandhu*, 886 F. Supp. 318, 322 n. 5 (S.D.N.Y. 1993).

Sound policy reasons support rejection of the *Gallina* dictum. The humanitarian exception would require courts to decide not only the legality of a particular extradition, but also the wisdom and virtue of it. Such rule would require extensive judicial exploration into the social conditions and legal system of a foreign country. This task is best left to the Secretary of State. *See United States v. Kin-Hong*, 110 F.3d 103, 110 (1st Cir. 1997).

Finally, petitioner contends that his United States citizenship presents a more compelling case for application of the humanitarian exception. (Petition, p. 13.) However, United States citizenship does not bar extradition by the United States. *See Charlton v. Kelly*, 229 U.S. 447, 467, 33 S. Ct. 945, 952, 57 L. Ed. 1274 (1913); *Quinn v. Robinson*, 783 F.2d 776, 782 (9th Cir. 1986). Again, the Department of State, not the district court, is best suited and uniquely empowered to determine the advisability of extradition under the particular circumstances of this case.

Accordingly, this Court on habeas review recommends that the petition for writ of habeas corpus be **denied**. Further, for the reasons set forth herein, this Court recommends that petitioner's April 3, 2003 request that this habeas court take judicial notice of a *Los Angeles Times* newspaper article about Thailand's war on drugs be **denied**.

RECOMMENDATION

For all of the foregoing reasons, IT IS RECOMMENDED that the Court issue an Order: (1) approving and adopting this Report and Recommendation; and (2) directing that Judgment be entered denying the instant Petition for Writ of Habeas Corpus and dismissing the Petition with prejudice.

DATED: November 5, 2003.

/s/ Jeffrey W. Johnson
JEFFREY W. JOHNSON
United States Magistrate Judge

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file Objections as provided in the Local Rules Governing the Duties of the Magistrate Judges and review by the District Judge whose initials appear in the docket number. No Notice of Appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the Judgment of the District Court.

APPENDIX 4

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION

SUWIT PRASOPRAT, Petitioner, vs. MICHAEL BENOV, Warden, Respondent.	Case No. CV 02-8751-HLH (JWJ) ORDER ADOPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE (Filed Nov. 25, 2003)

Pursuant to 28 U.S.C. § 636(b)(1)(C), the Court has reviewed the instant Petition for Writ of Habeas Corpus and other papers along with the attached Report and Recommendation of the United States Magistrate Judge, and has made a *de novo* determination of the Report and Recommendation. Further, the Court has engaged in a de novo review of those portions of the Report to which Petitioner has objected.

IT IS ORDERED that a Judgment be entered denying the instant Petition.

IT IS FURTHER ORDERED that petitioner's April 3, 2003 request that this court take judicial notice of a *Los Angeles Times* article about Thailand's war on drugs be denied.

IT IS FURTHER ORDERED that the Clerk shall serve forthwith a copy of this Order and the Judgment of this date on petitioner and counsel for respondent.

DATED: Nov. 24, 2003

/s/ Harry L. Hupp
HARRY L. HUPP
United States District
Judge

APPENDIX 5

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION

SUWIT PRASOPRAT, Petitioner, vs. MICHAEL BENOV, Warden, Respondent.	Case No. CV 02-8751-HLH (JWJ) JUDGMENT (Filed Nov. 25, 2003)

Pursuant to the Order of the Court approving the recommendation of the United States magistrate Judge, and adopting the same as the facts and conclusions of law herein,

IT IS ADJUDGED that Judgment be entered denying the instant Petition for Writ of Habeas Corpus.

DATED: Nov. 24, 2003

/s/ Harry L. Hupp
HARRY L. HUPP
United States District Judge

APPENDIX 6

HUMAN RIGHTS WATCH

Exhibit B

IV. Human Rights Abuses and the War on Drugs

> *They will be put behind bars or even vanish without a trace. Who cares? They are destroying our country.*
> – Interior Minister Wan Muhamad Nor Matha, referring to drug dealers, January 2003.[1]

> *In many provinces, there are death squads roaming around killing drug dealers. The rule of law and democracy could disappear overnight.*
> – Somchai Homlaor, secretary-general, Forum Asia, March 2003[2]

Thailand's "war on drugs" began in February 2003 for the official reason of responding to a boom in methamphetamines, locally known as *ya baa* or "crazy pills." The country had traditionally been associated with the trade in injected heroin through the Golden Triangle, a vast mountainous region spanning Burma, Thailand, and Laos. Between 1993 and 2001, methamphetamine use in Thailand rose an estimated 1,000 percent and, according to government estimates, overtook heroin as the drug of choice in the country.[3] Most *ya baa* was produced and smuggled from neighboring Burma and, to a lesser extent, Laos. By 2002, an estimated 2.4 percent of Thais aged twelve to sixty-five, including 4.5 percent of males, were using methamphetamines.[4]

In December 2002, Thailand's revered constitutional monarch, King Bhumibol Adulyadej, called on the government to bring the "methamphetamine problem" under control. Prime Minister Thaksin Shinewatra seized the opportunity, announcing on January 28, 2003, that a "war on drugs" would be waged on drug dealers. The use of the Term "war" was apt over the next three months more than 2,000 people in Thailand were killed as the government effectively declared "open season" on those accused of involvement in the drug trade. The crackdown saw rampant human rights violations, including government promotion of violence against drug suspects, extrajudicial executions, blacklisting of drug suspects without due process, intimidation of human rights defenders, and violence and other breaches of due process by the Royal Thai Police.

Promotion of violence by government officials

Deviating sharply from Thailand's previous efforts to build the rule of law, Thaksin called for his war on drugs to be conducted on the basis of an "eye for an eye." Prime Minister's Order 29/B.E. 2546 (2003), signed on January 28, 2003, called for the absolute suppression of drug trafficking by means "ranging from soft to harsh including the most absolutely severe charges subject to the situation."[6] The document stated that "[I]f a person is charged with a drug offence, that person will be regarded as a dangerous person who is threatening social and national security." In the ensuing weeks, the Ministry of the Interior gave each province in the country targets for the number of arrests of suspected drug traffickers and seizures of narcotics. Police and other officials were offered cash incentives for arrests and seizures, while senior

officials such as governors and police chiefs stood to lose their jobs if targets were not met. The Prime Minister said of the cash incentives that "at three Baht [U.S. $0.07] per methamphetamine tablet seized, a government official can become a millionaire by upholding the law, instead of begging for kickbacks from the scum of society."[6]

This was not what King Bhumibol apparently had in mind when he called for a solution to the methamphetamine problem, as he later expressed misgivings about the ferocity of the government's program.[7] Thaksin and his government discovered that there were political benefits in taking harsh measures against drugs. Thaksin's popularity soared, as Thais apparently sought a stronger approach to drug abuse.[8] Thaksin's near monopoly over state and private broadcast media hid most of the campaign's worst abuses from public view and allowed the government's message that all of those killed and targeted were dangerous criminals – and not men, women, and children against whom no charge had been laid – to gain popular acceptance.

Throughout the drug war, Thaksin and other government leaders repeatedly appeared to give the green light to use violence against suspected drug dealers. "In this war, drug dealers must die," Thaksin said. "But we don't kill them. It's a matter of bad guys killing bad guys."[9] Whether in favor or opposed to the crackdown, few in Thailand found this denial credible. Thaksin made his intentions even clearer in August 2003 when he said that Thai security forces would "shoot to kill" when they encountered Burmese drug traffickers on Thai soil.[10] A regional police commander, Pichai Sunthornsajjabun, was reported as saying in reference to the drug war killings, "a normal

person lives for eighty years, but a bad person should not live that long."[11]

In his January 14, 2003 speech announcing the campaign, the Prime Minister borrowed a quote from a former police chief known for having orchestrated political assassinations in the 1950s. "There is nothing under the sun which the Thai police cannot do." he said adding, "Because drug traders are ruthless to our children, so being ruthless back to them is not a bad thing. . . . It may be necessary to have casualties. . . . If there are deaths among traders, it's normal."[12] Then Interior Minister Wan Muhamad Nor Matha said of drug traffickers, "They will be put behind bars or even vanish without a trace. Who cares? They are destroying our country."[13]

Extrajudicial Killings

In the first three-month phase of the crackdown that began on February 1, 2003, the Royal Thai Police reported that some 2,275 alleged drug criminals had been killed.[14] Most were shot with handguns. The government initially claimed that fifty-one had been killed by police in self-defense and the rest in battles among dealers. In October 2003, Thailand's foreign minister told the U.S. State Department that 2,593 homicide cases had occurred in the country since the previous February, more than double the normal level of about 400 homicides per month.[15] On December 15, 2003, after the end of the first phases of the campaign, the Royal Thai Police reported 1,329 drug-related homicides (out of 1,176 separate incidents) since February, of which seventy-two (in fifty-eight incidents)

had been killed by police. More than 70,000 people allegedly involved in the drug trade were

* * *

Appendix 7

Bangkok Post
[Illegible]

May 29, 2005

Exh. C

Over 2,000 deaths during a government crackdown on drugs were not properly investigated, "reinforcing a climate of impunity" among Thailand's security forces, Amnesty International said last week.